



Internet Intermediary Liability

Eric Goldman

Director, High Tech Law Institute

Santa Clara University School of Law

egoldman@gmail.com

Overview



Starting point:

**WEBSITES AREN'T
LIABLE FOR THIRD
PARTY CONTENT**

47 USC §230

- 47 USC §230(c)(1): “No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider”
- Legislative history: intended to overrule Stratton Oakmont “and any other similar decisions which have treated providers and users as publishers or speakers of content that is not their own *because they have restricted access to objectionable material*”

47 USC §230



- “Provider or user of an interactive computer service”
 - ICS = “any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions”
- “Treated as a publisher or speaker”
 - Excludes federal crimes, [federal] IP laws and ECPA
- “Provided by another information content provider”
 - ICP = “any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service”



Section 230(c)(1) Implication

- Irrelevant: editorial control, scienter, takedown notices
- Race to the bottom...or race to the top?

47 USC §230(c)(2)



- “No provider or user of an interactive computer service shall be held liable on account of any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be...objectionable”

Secondary Liability (reminder)



- **Contributory infringement:** “with knowledge of the infringing activity, induces, causes or materially contributes to the infringing activity of another”
- **Vicarious infringement:** right/ability to supervise infringer’s acts + direct financial interest in acts

17 USC 512

- (a): safe harbor for transmitting data
- (b): safe harbor for server caching
- (c): safe harbor for hosting user content (“notice and takedown”)
- (d): safe harbor for linking
- (e): safe harbor for universities
- (f): liability for sending bogus takedown notices
- (g): safe harbor for counter-notifications
- (h): expedited process for IDing infringers

512(c) Defense Requirement



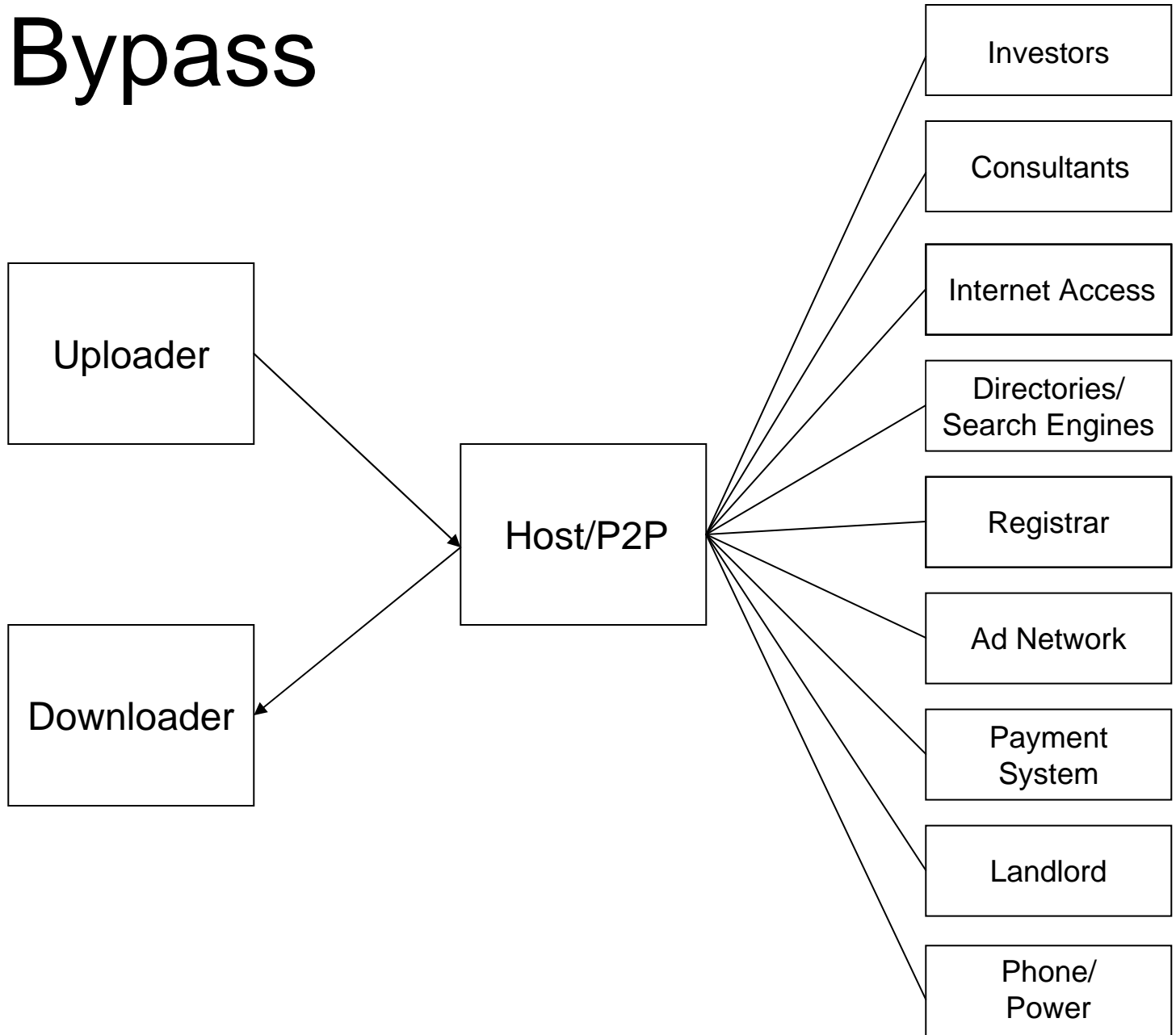
- Qualify as a “service provider”
- Show the material was stored at direction of a user
- Adopt a policy to terminate repeat infringers
- Reasonably implement that policy
- Communicate that policy to users
- Accommodate “standard technical measures”
- Designate an agent to receive §512(c)(3) notices
- Post its agent’s contact info on its website
- Not have actual knowledge of infringement or an awareness of facts/circumstances that infringement apparent (no “red flags”)
- Not have the right/ability to control infringement
- Not have a direct financial interest in the infringement
- Expeditiously respond to §512(c)(3) notices.

Publisher/Speaker v. ©



	47 USC §230	17 USC §512(c)
Who	ICS provider/user	Online service provider
Claims covered	Everything but [federal] IP, federal crimes, ECPA	Copyright
Duty upon notice	None	Expeditious take down
Effect of Scien-ter	None	No safe harbor
Prerequisites	None	Registration + other formalities

512 Bypass



230 Bypass: Copyright



- Step 1: doctors get copyright ownership of unwritten patient reviews
- Step 2: patient posts review
- Step 3: doctors send 512(c)(3) takedown notices to review site
- Step 4: send 512(h) unmasking subpoena to review site

230 Bypass: Trademark



- TMs should protect marketplace confusion about source of goods
 - TM Owners: we own our brand!
- Ascentive:
- Third level domain name
 - Referencing TM in consumer reviews
 - Metatags
 - SEO
 - Keyword triggering